No. 65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

WOKO, INCORPORATED.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 59-73) is reported in 153 F. 2d 623.*

* The decision of the Federal Communications Commission (R. 23-38, 58), reversed by the court below, has not been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 21, 1946 (R. 73). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

The only questions presented—notwithstanding the Government's contrary contention—are:

(1) Was the court below correct in holding:

> "Simply stated, the question in this case is whether it is logical and rational to say that a licensee cannot be entrusted with further responsibilities for the sole reason that, over a term of years, one of its officers has concealed from the Commission the identity of a beneficial owner of twenty-four percent of its capital stock" (R. 71);

and,

(2) Did the court below commit reversible error in answering (1) *supra* in the negative.

STATEMENT.

Respondent does not dispute any of the findings of fact made by the Commission in its decision which is the subject of this litigation (R. 23-35). However, respondent disputes vigorously that the 16 page "Statement" (Gov. Br. 3-19) filed by petitioner contains an accurate restatement of the Commission's 12 page findings of fact. Accordingly, respondent adopts as its own for the purposes of this brief, the findings of fact (R. 23-35) made and entered by the Commission as a basis for denying respondent's application for renewal of license, and for a summary of those findings, the accuracy of which is not disputed by the Government, respectfully refers this Court to the statement of the facts in this case found in the opinion of the court below (R. 59-64).

SUMMARY OF ARGUMENT.

I. The court below properly held that the Commission's decision on respondent's renewal application was an unlawful imposition of a penalty and not a valid exercise of the Commission's licensing power. The correctness of the Court's decision is shown (a) by the procedure on respondent's renewal application which followed the lines of a criminal prosecution, and the Commission's summary dismissal of respondent's proffer of a corporate reorganization which would insure non-recurrence of the condemned misconduct, in striking contrast to Commission action in similar cases decided before and after this one; (b) by the Commission's decision which ignored elements relating to the qualifications of the respondent to operate and program Station WOKO on the theory that these elements bore on mitigation of punishment rather than on the basic question of respondent's qualifications, and the assertion of the power to punish as a means of lightening the Commission's administrative burden; (c) by the arguments advanced by the Government in defense of the Commission's action, justifying it as a means of discouraging others from making false statements to the Commission, thereby ignoring the statutory scheme prescribed by Congress for the imposition of sanctions upon one making a false statement to a Government agency.

II. The court below properly rejected the Government's argument that the Commission's administrative burden justified a refusal to pass on the merits of respondent's renewal application, since the Commission cannot avoid its duty to determine an applicant's qualifications to operate a station, irrespective of any past misconduct of the applicant. The Commission has so construed its statutory duty in *In the Matter of John H. Stenger, Jr.*, F. C. C. Docket 6[illegible] (May 29, 1946). The ownership by Pickard of a beneficial interest in 24% of respondent's stock was not material to a determination of respondent's qualifications to be a licensee. The arithmetic of respondent's stock distribu-

tion, which, as the Commission formally finds in its decision, was not fortuitous, but was designed to prevent Pickard from exercising any control of respondent corporation, precludes any argument that the concealment of his interest prevented the Commission from passing upon respondent's qualifications. Had the Commission been supplied with the facts as to Pickard's interest in respondent, it would thereby have had no basis for making any adverse finding on respondent's qualifications. It is indisputable that the non-disclosure of the Pickard interest was not made for the purpose, nor did it have the effect, of inducing or deterring any Commission action with respect to respondent's operations as a licensee or on any application filed by respondent. The court below, therefore properly stated that the only question involved in this case is "whether it is logical and rational to say that a licensee cannot be entrusted with future responsibilities for the sole reason that, over a period of years, one of its officers has concealed from the Commission the identity of a beneficial owner of 24% of its capital stock."

III. The court below properly held that the jump from the Commission's finding of concealment of the Pickard interest to the conclusion of lack of trustworthiness was not logical and rational. In so doing the court below did not usurp the Commission's administrative functions; it did not make findings of its own, but held only that the Commission's conclusion was a *non sequitur* from the facts which the Commission had found, and that it could not find any support for the Commission's conclusion from any other facts established in the administrative record. The Government's suggestion in this Court of a rational basis for the Commission's conclusion is an attempt by the Solicitor General to determine public policy in a field which, he insists, is committed exclusively to the Commission. Not only did the Commission not adopt the policy arguments now suggested by the Government concerning the evil of network officials having a stock interest in independent radio broadcasting stations, but the Commission by formal proclama-

tion has explicitly stated that it has not adopted a policy against such ownership and its decisions evidence a contrary policy. The non-disclosure of Pickard's beneficial interest obviously did not impair the ability of respondent in the past to discharge its responsibilities as a licensee to operate in the public interest, convenience and necessity. Nothing in logic, precedent or Commission experience justifies the conclusion that after or because of the disclosure of the Pickard interest, respondent will not continue to file truthful, accurate and complete reports on all material matters to the Commission or will not continue to operate Station WOKO in the same manner as it has in the past, admittedly in the interest of the public. The licensing experience of the Commission has demonstrated that licensees who have made misrepresentations (and licensees who have failed to disclose material matters and have made fraudulent misrepresentation in an effort to conceal material matters) have nevertheless been found qualified to operate radio stations in the public interest. The conclusion of the Commission that non-disclosure or misrepresentation in those cases would not impair the ability of such licensees to operate in the public interest has been justified by the operation of all the stations which have been permitted to continue operation, notwithstanding the making of material and even fraudulent misrepresentations. This experience offers no support to a conclusion in the instant case, where no fraud was involved, and where the non-disclosure was wholly immaterial, that respondent cannot be entrusted in the future as it has been in the past to operate its station in a manner consistent with highest standards of public interest. The court below found the Commission's contrary conclusion a *non sequitur* from the finding that Pickard's interest in respondent had been concealed and in so holding did not commit reversible error.

The use in the Government's brief of the word "character", not found in the Commission's decision, injects a false issue in the case. If "character" does not mean the

same thing as trustworthiness to perform the responsibilities of a licensee then the Government is injecting into the case a basis for the Commission's action which was not given by the Commission. If "character" means the same thing as trustworthiness to program and operate a broadcast station, the use of this synonym does not change the basic issue in this case, to wit, whether the finding that respondent made a false statement to the Commission justified the conclusion that it cannot be entrusted with the responsibilities of a licensee.

ARGUMENT.

I.

The Commission's Refusal to Renew the WOKO License Was Properly Set Aside on the Ground that it Constituted an Unlawful Imposition of a Penalty Upon Respondent.

A. The court below correctly held that the Commission may not lawfully refuse renewal of license in order to impose a penalty.

In its opinion the court below (R. 71) stated:

> "The denial of the renewal because of the applicant's failure to show the beneficial ownership of twenty-four per cent of its capital cannot be justified as a penalty for making false statements. The Act does not confer upon the Commission any punitive jurisdiction, and a license or its renewal may not be withheld in order to punish an applicant for violating the Act or a rule or regulation of the Commission. Such violations are to be punished only by the imposition after conviction, of the heavy fines imposed by Sections 501 and 502 of the Act. Nor does the Commission claim the right to punish, but on the contrary disavows any punitive intent here."

In its brief in this Court the Commission does not explicitly disavow punitive intent. It seeks, however, to avoid the holding that it refused to renew respondent's license as

a means of punishing Pickard and Smith by conceding a lack of statutory power to impose penal sanctions. (Gov. Br. 28.) This, coupled with the demonstration under Section B, *infra*, that the court below was justified in its holding that ". . . the denial of the renewal license was penal in nature and so intended by the Commission . . . ", is tantamount to a confession of error by the Commission.

B. The court below correctly found that the Commission's action was a penalty and was so intended.

The court below held (R. 71-72):

> ". . . the conclusion that the denial of the renewal license was penal in nature and so intended by the Commission cannot be escaped, . . ."

That the Commission's action was in essence penal is demonstrated both by the procedure followed by the Commission on respondent's renewal application and by the Commission's decision, and is effectively conceded by the necessary implication of the Government's argument in defense of such action.

1) *The procedure followed by the Commission reveals the penal character of the proceeding.*

It is clear from the record that throughout the entire administrative proceeding the Commission conceived the basic issue to be whether or not respondent was guilty of the charge of violating a Commission requirement concerning disclosure of the identity of its stockholders. The objection by Commission counsel to the introduction at the hearing of evidence relating to twelve year record of operation of Station WOKO and the failure of the Commission in its decision to advert to this important consideration is evidence of this fact.* A reading of the administrative record shows

* The examiner at the hearing overruled the objection of Commission Counsel and admitted such evidence. The Commission, however, quite apparently considered the objection of its counsel on the ground that such evidence was irrelevant well taken, for in its opinion it completely ignores the existence of the record evidence on this point.

that, except for the fact that respondent was charged with the burden of proving itself innocent, the whole conduct of the Commission proceeding was that of a prosecution.

The attitude of Commission Counsel was that of a prosecutor throughout. Contrary to the usual procedure in vogue at the Commission on hearings for renewal of licenses, witnesses were excluded from the hearing room so as to prevent any witness hearing the testimony of any other witness on the question of Pickard's stock interest. Every discrepancy, however minute, on testimony of matters taking place ten years or more before was seized upon and emphasized in the examination. Imbued with the sole idea of proving the respondent's admitted misrepresentation of a minority stock interest and of punishing them for it, the Commission steadfastly refused to take into consideration anything that would tend to substantiate respondent's proven trustworthiness and reliability to discharge the major responsibilities of a broadcast station licensee. Indeed at the oral argument, after the Commission's proposed decision had been handed down, an offer was made by the respondent to buy out Pickard's stock interest to thus rid itself of the focal point of Commission attack. (Tr. 1713, 1714) Questions asked by the Commissioners there indicated that they were not concerned with the qualifications of the licensee to operate in the future after the severance of the Pickard interests, but the only question of apparent concern was whether or not the plan would result in any monetary reward to Pickard. (Tr. 1715, 1716) Since the plan was to buy out Pickard's interest the only alternative was categorically to deny the renewal of license and thereby punish Pickard and respondent by depriving them of any chance of realizing a profit. (Something which in no wise could be of any concern to the Commission.) This point is sharply illustrated by the Commission's subsequent action in summarily denying respondent's petition for rehearing (Tr. 1751) in which a complete plan of reorganization was proffered, (Tr. 1742-1747) which would eliminate Pick-

ard entirely, and put Smith and Curtis in a minority non-voting position, as well as bring about a complete change in officers and directors, ineluctably leading to the conclusion that the Commission considered the proceeding to be one calling for the imposition of sanctions rather than one relating to the qualifications of respondent to continue to operate a radio broadcast station in the public interest.

Contrast the Commission's treatment of respondent's offer to reorganize its corporate structure so as to eliminate any basis for Commission objection to any of its officers or stockholders with the manner in which the Commission, both before and after its decision in the instant case, treated similar situations in other cases.

In *Lee E. Mudgett* (KRKO), 8 F.C.C. 227, 228 (1940), the Commission said:

> "The Commission, being fully advised in the premises, and mindful that its function as an administrative agency is not the imposition of penalties upon radio station licensees for their derelictions, except insofar as such action may result in some public benefit, but the correction of irregularities in station management and operation, as well as the encouragement and promotion of methods whereby such licensees may supply the most satisfactory public service in accordance with the Communications Act of 1934, as amended, and the rules of the Commission promulgated thereunder; and considering that the consummation of the proposals set forth in the instant applications for construction permit and assignment of license will result in an improved and entirely satisfactory public service, and the removal from the station of all the irregularities and inefficiencies heretofore found therein; the Commission concludes that public interest, convenience, and necessity will be served by granting the instant applications for renewal and assignment of the KRKO license . . ."

The foregoing statement of the Commission's statutory duty, as interpreted by the Commission itself, can hardly be reconciled with its action on respondent's petition for rehearing.

Perhaps the most striking contrast to the Commission's attitude in the instant case, considering the identity of some of the persons involved, is found in *Georgia School of Technology* (WGST), F. C. C. Docket 5903, 10 F. C. C. —, March 23, 1943, where misrepresentations provided the fraudulent inducement for successive renewals of the station license, and concealed an illegal assignment of rights granted under the license without the consent of the Commission as required by the Communications Act. In this case the Commission found that the true owner of Station WGST was a corporation which had never been licensed by the Commission to operate the station. It is significant that the same Sam Pickard, who is involved in the proceeding on respondent's renewal application, was found by the Commission to own, together with members of his family, 69.99% of the stock of the unlicensed corporation which operated Station WGST. In its decision the Commission pointed out that the legal licensee of the station had failed to assume the responsibilities and to discharge the duties of the licensee of a radio broadcast station as required by the Communications Act of 1934, as amended, and the Commission's rules and regulations. This was a case in which the record demonstrated, and the Commission found that the licensee had consistently failed over a period of years to carry out the duties and responsibilities which had been entrusted to it under its license. The Commission found that the license of the station could not be renewed under the circumstances disclosed by the record on the renewal application, but entered an order giving the licensee 60 days in which to submit evidence to the Commission that it would for the future assume and carry out the responsibilities imposed by a renewal of its license, stating that if this were done the license would then be renewed. The explanation given by the Commission for its action was as follows:

> "5. Under the present circumstances, the license cannot be renewed. However, no useful purpose would be served by refusing to renew the license under any and all conditions. Moreover, a continuation of the pro-

gram service of Station WGST under proper management will serve the public interest, convenience and necessity."

Nothing in the Commission's decision on respondent's renewal application discloses any useful purpose that would be served by refusing to renew its license under any and all conditions. Compare the result reached in the *WGST* case with the Commission's unconditional refusal to renew respondent's license, and its refusal *even to consider* any proposal of respondent, which would insure a continuation of the program service of Station WOKO under proper management. When it is considered that the basis for refusing to renew respondent's license was the fact that in the Commission's opinion Mr. Pickard, or a member of his family, was the "real owner" of a minority (and from the standpoint of any control, an insignificant) interest in respondent corporation, and that in the *WGST* case the same Mr. Pickard, or his family, was the "real owner" of 69.99% of the stock of the corporation in control of the station, it is impossible to conclude that the Commission's decision in the instant case was governed by proper statutory criteria. See also *Georgia School of Technology* (WGST), F. C. C. Docket 6534, Sept. 19, 1945.

In *WOAX, Incorporated* (WTNJ), *et al.*, F. C. C. Docket 5361, Sept. 5, 1946, the Commission found that the City of Camden, licensee of Station WCAM, had illegally transferred control of the major portion of its program service to a third party who had exploited the station "without reference to the licensee and to its duty and responsibilities to operate in the public interest under the Communications Act of 1934." The conclusion of the Commission was as follows:

"Recapitulating, the Commission proposes to . . . deny the applications of WCAM for renewal of license and modification of license, without prejudice, however, to the City of Camden filing a new application for a construction permit and license to operate on 1310 kilocycles, . . ., providing it is affirmatively shown that the

City of Camden would have the exclusive use and control of the station and that no further effect would be given to the agreements here declared to be contrary to the public interest: . . . ."

In the *WCAM* case the Commission on its own motion invited an existing licensee to submit a proposal to the Commission, which would eliminate the reasons which the Commission had given for refusing to grant a regular renewal of its existing license. To the same effect was the Commission's decision in the *Buffalo Broadcasting Corporation case,* F. C. C. Dockets 6324 and 6325, Dec. 19, 1945 (discussed *infra* pp. 52-53), and the *Joliet Broadcasting Company (WJOL) case,* F. C. C. Docket 6983, July 13, 1946.

In view of the established policy of the Commission not to delete an existing station where there appears to be a feasible way open to eliminate the obstacle to a regular renewal of license, the Commission's summary refusal to consider respondent's plan of reorganization which would have assured the non-recurrence of the misconduct with which it was charged, constitutes in law arbitrary action. The Commission's main responsibility as a licensing body, as it has been uniformly construed by the Commission itself, both before and after its decision in the instant case, is not to punish licensees for malefactions, but to encourage the use of radio facilities in the public interest by qualified licensees. Since the Commission has not exhausted its best efforts, indeed has stubbornly refused even to attempt to accomplish its statutory responsibility in the instant case, its action here cannot be judicially upheld. *Jacob Siegel Co.* v. *Federal Trade Commission,* No. 605, October Term 1945, decided March 25, 1946 (not yet reported).

The Commission's long established and uniformly followed practice of dealing with renewal applications not as a tribunal administering a penal statute, but as a licensing body exercising remedial functions, finds Congressional endorsement in the recently enacted Administrative Proced-

ure Act. *(Pub. L. No. 404, 79th Cong., 2d Sess. (June 11, 1946) § 9(b).)*

2) *The Commission's findings and conclusions demonstrate the penal nature of its action.*

Revealing as the procedural aspects of the case are on the question of whether the Commission proceeding was in substance a trial on penal charges or a hearing to determine qualifications, far more revealing is the Commission's decision itself. In its decision the Commission discusses the question of whether it is required or has authority under the statute to demand disclosure of stock interest, and concludes that it has on the theory that it is required to ascertain facts with respect to alien ownership, conviction under anti-trust laws, etc., none of which issues was in any wise involved in the instant case. Having established to its satisfaction the validity of its requirement of disclosure, it then proceeded to consider whether or not respondent, through Smith, was guilty of violating this requirement. Having concluded that respondent was guilty, it proceeded to impose a punishment, namely, denial of renewal of license. The only place in the Commission's decision in which the question of respondent's qualifications is adverted to is in the paragraph just preceding its formal conclusion. There it holds in substance that any one guilty of violating the Commission's requirement of disclosure is thereby demonstrated to be not qualified as a licensee. This might be enough to justify punishment—it is far short of enough for a determination of respondent's qualifications to continue to operate its station in the public interest. Thus, in both its procedure and in its decision the Commission ignored and failed to consider the question of whether respondent had the necessary character and other requisites to continue as a licensee of a radio broadcast station, and reached its conclusion that respondent was not qualified solely on the insufficient ground that respondent in its opinion was guilty of violating the requirement of disclosure.

The Commission's interpretation of the revocation section of the Act (312(a)) as being penal and as authorizing refusal to renew a license to punish one making a misrepresentation to it, is plain from its penultimate conclusion:

> "6. The applicant cannot deal with the Commission at arm's length, and the 'morals of the marketplace' cannot be a standard of candor under the Communications Act of 1934. *In the Matter of Van Curler Broadcasting Corp.*, 9 F. C. C. 92, 101 (1942); *In the Matter of the Mayflower Broadcasting Corp.*, 8 F. C. C. 333, 338 (1940); *In the Matter of John H. Stenger*, 8 F. C. C. 434, 444 (1940). In the performance of our statutory duties we are called upon to determine whether the operation of proposed stations or the continued operation of stations previously licensed would serve public interest. In so doing, we are forced to rely to a great extent upon the representations made in applications, in statements, and in testimony offered at hearings. It is significant that under the provisions of the Act, a station license is subject to revocation for false statements in an application. (Section 312(a), Communications Act of 1934, as amended.)"

The court below disposed of this reliance upon Section 312(a) by construing the revocation section as not conferring punitive jurisdiction upon the Commission, but properly applicable only in a case where "public interest, convenience or necessity would be served by the revocation" (R. 67-68). Even if it be assumed, however, that the section does confer penal jurisdiction upon the Commission, then that construction prevents its invocation in this case, for as mentioned above, the Government concedes, (Gov. Br. 28) that the Commission may not lawfully use its power to grant or refuse renewal of licenses as a means of punishing a licensee.

In its brief in this Court the Government abandons the contention advanced by the Commission in its decision that licensees cannot deal with the Commission "at arm's length", or govern themselves by the "morals of the mar-

ketplace''. Neither does the Government cite in support of the Commission's action, any of the three decisions which the Commission relied upon in reaching its conclusion. Since the crucial question before this Court is whether the findings and conclusions found and given by the Commission support its refusal to renew respondent's license, and not whether the reasons which the Government now advances might* if they had been given by the Commission, support its action, it is necessary to examine more closely the precedents cited by the Commission, even though they are now ignored by the Government.

The first case cited by the Commission, in its decision, *In the matter of Van Curler Broadcasting Corporation,* 9 F. C. C. 92, is a case in which the Commission was called upon to compare the qualifications of competing applicants for the same facility and decided to prefer one over the other because, among other factors, misstatements were made concerning the financing of one of the applicants. Among the other factors was the inferior program service proposed by Van Curler Broadcasting Corporation with respect to which the Commission, in the opinion cited by the Commission, stated: "We are, therefore, unable to find from this record that the applicant, Van Curler Broadcasting Corporation, would provide a well-balanced program service, or service comparable or superior to that proposed by Western Gateway Broadcasting Corporation." 9 F. C. C. 92, 102. Nothing in the Van Curler decision can be tortured into a holding that the unsuccessful applicant would have been denied solely on the basis of misstatements had there been no competing applicant presenting better qualifications for the facilities requested.

The second case cited by the Commission in its decision, *In the Matter of Mayflower Broadcasting Corp.,* an application for construction permit to establish a new station in

* We show below, pp. 39-41, that the reasons now being advanced by the Government in support of the Commission's action are no better than those given by the Commission in its decision.

Boston, was denied by the Commission on the ground that the applicant had made "*material* representations in its application which are at variance with the true facts". (Italics supplied) The representations referred to concerned the applicant's financial qualifications, and on the basis of the true facts, the Commission found and gave as a basis for its decision: "Applicant, the Mayflower Broadcasting Corporation, is not shown to be financially qualified to construct and operate the station proposed by it". The Commission did not, and indeed could not find that a disclosure of Pickard's beneficial interest in respondent would have required or justified any adverse finding by the Commission as to respondent's qualifications.

The third case cited by the Commission in its decision is *In the Matter of John H. Stenger, Jr.*, 8 F. C. C. 834. It is understandable why the Government has not also advanced this decision as a precedent supporting the Commission's action in this case. In the *Stenger* case the Commission in 1941 refused to renew the license of Station WBAX, Wilkes Barre, Pa., on the grounds, among others, that the licensee, John H. Stenger, Jr., had made false representations in applications and other documents filed with the Commission; had relinquished control over his station and his right to exercise control without the prior consent of the Commission as required by law, and had failed to discharge properly the obligations made incumbent upon him in licenses which he had received from the Commission; and that Stenger was not financially qualified to continue the operation of the station. The false statements made by Stenger were with respect to his outstanding liabilities and that they were material false statements is shown by the Commission's conclusion that on the basis of the true facts as to Stenger's liabilities, he was not financially qualified to operate the station for which he was requesting a renewal of license.

Although Stenger's license renewal was refused in 1941, he was given a series of temporary authorizations to con-

tinue to operate Station WBAX until May, 1946, when the Commission granted him a regular renewal of license. In the meantime four other applicants had filed requests with the Commission for authority to use the frequency licensed to Stenger. Stenger also filed a new application for license to operate Station WBAX and all the conflicting applications, including Stenger's, were set for hearing. After extensive hearings, the Commission on May 29, 1946, issued its decision, finding all five applicants legally, technically and financially qualified to be licensees, and further found that each applicant proposed to render "what appears to be a meritorious program service". Stenger was preferred by the Commission over the other four qualified applicants because of his "long record of experience as a technician and operator". The Commission, in its decision, repeated the findings made in 1941 when it had denied Stenger's renewal application and explicitly stated that it was not altering or changing those findings, among which were those relating to material false statements in applications and documents filed with the Commission. *In the Matter of John H. Stenger, Jr.*, F. C. C. Docket 6723, May 29, 1946.

Is it any wonder that the Government does not rely, as the Commission's decision did, on the *Stenger* case, 8 F. C. C. 434? The subsequent history of the *Stenger* case argues more eloquently than could any abstract argument, the fallacy in the Commission's decision on respondent's renewal application. Respondent's contention is that its 15 years' experience as a licensee had some bearing upon its qualifications to continue to operate Station WOKO. The Commission completely ignored respondent's record as a licensee, citing the Stenger case of 1941 (involving material misrepresentation) as a precedent for holding that concealment of information, without regard to its materiality, automatically establishes untrustworthiness to operate a radio station in the public interest. After the decision on respondent's application, and while this case was in litigation, the Commission not only found that Stenger

could be entrusted with the responsibilities of a licensee, despite the material false statements he had made in his earlier renewal application, but found him better qualified than four other applicants (admittedly qualified) because of his "long record of experience".

We submit that the Commission has throughout this proceeding treated it as one involving the imposition of sanctions or penalties rather than the determination of respondent's qualifications to be the licensee of a radio broadcast station. We believe this accounts for the Commission's disregard of respondent's previous record as an outstanding broadcasting operator. We believe it accounts for the Commission's disregard of the fact that Pickard's connection with the station involved the exercise of no control, involved no possibility of alien ownership and involved no possibility of any restraint of trade or monopoly in radio communications (the only basis upon which the Commission's decision suggests that it would be justified in asking for the information not disclosed). (R. 36) The refusal to renew respondent's license obviously stems from the Commission's view that these are irrelevant considerations on the issue of respondent's, or perhaps more properly, Pickard's and Smith's penal liability. This also accounts for the Commission's refusal to consider respondent's proposal to reorganize its corporate set-up so as to eliminate any possibility of recurrence of the derelictions which the Commission has so vehemently condemned. (R. 69, 70)

3) *The Government's arguments in defense of the Commission's action demonstrate its penal nature.*

The Government's arguments in defense of the Commission's action in this Court as well as in the court below, demonstrate that the action was taken solely because, in the Commission's view, Pickard and Smith should be punished. It urges (Gov. Br. 30):

"It is evident that the Commission can properly exercise its licensing and other functions only if it receives adequate and truthful information from applicants and licensees. There are approximately 1000 standard broadcast stations presently licensed by the Commission, and, in the near future, there will be hundreds of television stations and several thousands of frequency modulation stations. Licenses for all of these stations have been or will be authorized to a great extent upon the basis of a showing made in applications. Renewals are granted on the same basis. If a detailed investigation were required to determine the accuracy of the representations contained in each of the thousands of applications received annually, an intolerable burden would be imposed upon the Commission. Such a requirement would seriously impede, if not prevent its normal operations.[13] It is, therefore, necessary for the Commission to rely on the truth of the representations made to it. This factor, *in itself*, justifies an insistence by the Commission upon complete honesty by applicants, and *demonstrates that a finding of untrustworthiness in the dealings of an applicant with the Commission is sufficient to justify the further finding that the applicant does not have the good character which is essential for a licensee if the radio system is to be operated in the public interest.*" (Italics supplied)

This situation was obviously recognized by Congress when it legislated to impose criminal sanctions on those who make misrepresentations to the Government. There is nothing unique about the Commission's position in this regard. It is equally true of the Securities and Exchange Commission, the Federal Power Commission, the Federal Trade Commission, the Post Office Department, the Bureau of Internal Revenue, and indeed of almost all Government

[13] On the basis of information gathered for the forthcoming annual report of the Commission for the fiscal year ending June 30, 1946, it appears that during that year 3,238 applications for broadcast facilities were processed. In addition, there were many thousands of applications for authorizations in the other radio services, such as aviation, maritime, police, fire, etc.

departments and agencies. Whether or not the sanctions imposed by Congress to punish those who make misrepresentations to the Commission are adequate to accomplish their purpose is a proper concern of the Commission in the discharge of its duty to make legislative recommendations to the Congress. It cannot create artificial criteria of licensee qualifications to enlarge the area of Congressional sanctions, however inadequate such sanctions may appear to be to the Commission. As was said by this Court in *Republic Steel Corporation* v. *National Labor Relations Board*, 311 U. S. 7, 11-12:

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order . . .'"

The precise argument thus repudiated by this Court is urged by the Government in the following words (Gov. Br. 32):

> ". . . application of the restrictive rule laid down by the court below would go far to destroy the effective authority of administrative agencies to require the furnishing of truthful information."

The attempt to justify what Chief Justice Groner in dissenting below described (R. 72) as:

> "The Commission's drastic order, terminating the life of the station", which, "punishes the innocent equally with the guilty, and in its results is contrary to the Commission's action in several other comparable cases"

on the ground that it will have a healthy deterrent effect on persons tempted to make false statements to administrative agencies, exposes the Government's recognition that the Commission is asserting a purely punitive jurisdiction.

The dissenting opinion of Chief Justice Groner in the court below is grounded upon his concept of "public policy". Chief Justice Groner expressed no dissent from the holding of the majority of the Court that the Commission's action was penal in nature and so intended by the Commission. In fact he characterizes the Commission's order as "drastic", he concedes that the order "punishes", that the punishment in this case affects "the innocent equally with the guilty" and that the order "in its results is contrary to the Commission's action in several comparable cases." Why considerations of "public policy" require an interpretation of the "power of the Commission to determine public interest, convenience and necessity" as broad enough to impose penal sanctions upon those who make false statements to it, Chief Justice Groner does not explain. Reference to Commission decisions on other renewal applications both before and after its decision in this case, in which misrepresentations had been made by existing licensees, shows that the Commission has uniformily held that considerations of public policy require a contrary interpretation of its licensing power. Congress has recently expressed a public policy to govern cases where licensing bodies determine that the holder of an outstanding authorization has committed some act which in the judgment of the administrative agency justifies termination of such authorization. Chief Justice Groner's concept of "public policy" is contrary to that expressed by Congress.* We are not contending that the Administrative Procedure Act was applicable to respondent's renewal application when it was pending before the Commission. We do contend

* "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." § 9(a), Administrative Procedure Act, *supra*.

that this statute contains an expression of what Congress has found considerations of public policy dictate in a case like the one at bar, and leaves no room for doubt that the conduct of the licensing agency must be justified as remedial and not as penal action.

The affirmance by this court of the unsupported conclusion of Chief Justice Groner as to the exigencies of public policy, *would, therefore, not merely constitute* a determination in a field committed to Congress and the Commission, but would result in the establishment of a precedent which flies in the teeth of what the Commission and Congress have explicitly found as a general policy not to be in the public interest.*

The Government's position in the instant case, we think, is completely understandable on the theory that the Commission, having decided that Smith and Pickard ought to be punished, even though punishment had to be inflicted indirectly through respondent, and having decided that their actions warranted punishment as severe as the deletion of the station, denied renewal of license for WOKO. We think the Government's contention in its brief that its actions in other cases where more serious misrepresentations were found to have been made (even where licenses were found to have been obtained by fraud) should not be considered as having any bearing in this case, is understandable on the theory that the Commission regarded its action in the instant case as the imposition of a penalty. For in such circumstances, it is not appropriate for one found guilty and punished to appeal on the ground that others found guilty of the same crime received less punishment or a suspended sentence, or no punishment at all. The Com-

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* " . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements . . . " § 9(b) Administrative Procedure Act, *supra*.

mission's action in ignoring other factors highly important to any determination of respondent's qualifications to continue to operate Station WOKO as irrelevant is understandable on the theory that the Commission was determining guilt and imposing punishment, for in such case these factors would be irrelevant (except on the question of mitigation).

Particularly revealing is the Government's reiteration in its brief of the fact that the concealment was "wilful", and suggestion that if it were accidental or inadvertent or had lasted only for a short period, and had been revealed by the licensee voluntarily, a different conclusion would have been justified. (Gov. Br, 33)

There is no question but that the receipt of dividends by Pickard or Mrs. Pickard on 24 per cent of respondent's stock was intentionally concealed from the Commission. The Government's brief fails to mention that the receipt of such dividends was not concealed from the Bureau of Internal Revenue. This agency of the Federal Government, to which the facts as to the receipt of dividends was a material matter, was fully and completely informed. (Applicant's Exhibit 14-C; Tr. 1308.)

Nor does the brief advert to the fact that the Commission affirmatively found that the purpose of concealing the receipt of such dividends from it was to prevent the fact from becoming known to Pickard's colleagues in the Columbia Broadcasting System organization who felt that Pickard was receiving greater benefits than some of them from his employment (R. 30). (The purpose was not, as the Government contends in the brief (Gov. Br. 35), at variance with the Commission's affirmative finding, to enable Pickard to take advantage of his employer.) Obviously, the facts could not be kept from Pickard's fellow employees at Columbia if they were made a part of the public records of the Commission. That and that alone was the reason for not reporting to the Commission the facts as to Pickard's interest in various applications filed with the Commission.

About this there is no controversy. If this is all that the Government means by the "wilfull", the term would seem to have but little significance, for it obviously in these circumstances has no connotation of deliberate intention to mislead the Commission or any other agency of the Federal Government as to facts important to the Commission or to such other agency. It may also be observed that the Government's contention that respondent did not disclose the facts voluntarily and attempted to conceal them in the instant proceeding (Gov. Br. 34, 38) is difficult to reconcile with the fact that all of the evidentiary argument of the Commission (Gov. Br. 5-14), is based upon facts found in respondent's exhibits, as the references on those pages indicate, or in the testimony of Smith (with the exception of certain facts relating to Phelps, about which both Phelps and Pickard swore Smith knew nothing).

II.

The Court Below Properly Rejected the Government's Contention that the Commission's Action was Not Based Solely Upon the Finding that Smith had Made Misrepresentations.

The court below in passing upon the argument that the Commission's decision could be justified on non-penal grounds observed (R. 71):

> " . . . the Commission's decision must depend for validity on the rationality of the step, directly and without any other consideration, from the Commission's well-grounded finding that the real beneficial owner of twenty-four per cent of the stock had been concealed from it, to the conclusion that the appellant 'cannot be entrusted with the responsibilities of a licensee,' and the consequent additional conclusion that the renewal license would not serve the public interest, convenience, or necessity."

The view thus expressed was based upon the court's rejection of the Commission's arguments:

(a) that its administrative burden justified refusal to pass on the merits of respondent's renewal application, and

(b) that Smith's concealment of the fact that Pickard either received himself or designated the recipient of the dividends on twenty-four per cent of respondent's stock was material and important, since only persons whose qualifications had been approved by the Commission could legally receive such dividends.

Both of these contentions are renewed in the Commission's brief here. (Gov. Br. 30, 35.) We show below that they were properly rejected.

A. The number of applications filed with the Federal Communications Commission is not relevant to the issue of whether a misstatement in an application requires or justifies denial of such application.

Our contention on this point—if we may, without impertinence, paraphrase the twice-repeated (Gov. Br. 22-23, 45) full syllabled McGuffeyism of the Government—can be stated in a sentence:

But, whether there are 10 or 1000 or 10,000 applications filed with the Commission, "cannot serve to make a trivial misstatement serious or a grave falsification a matter of no consequence."

The Commission is not the only agency of government required to deal with a staggering number of applications and reports. It is plain, however, from its contentions here that it considers itself *sui generis* among Government agencies in that it does not consider the sanctions imposed by the penal code to deter the making of false statements to the Government adequate to assure the conduct of Commission business. A careful examination of the Communications Act of 1934, as amended, discloses that the Congress is either unaware of, or in disagreement with the Commis-

sion on this point. The Act does not confer upon the Commission any powers not possessed generally by other federal agencies to impose sanctions in addition to those prescribed by Congress in order to deter the making of misstatements or to prevent the concealment of facts.

It is unnecessary to labor the point in the light of the Commission's frank disavowal of this power (Gov. Br. 28). It is pertinent to point out, however, that only the existence of this admittedly nonexistent authority can support the assertion that the weight of the Commission's administrative burden justifies a refusal to pass on the merits of an application filed by one who has concealed or misrepresented facts requested by the Commission. It is also in point to observe that the Commission's implied condemnation of the deterrent effect of the penal statutes as inadequate—and this is the root of its contention—is not urged upon the basis of any failure of these statutes in operation. They have been found wanting without even a trial; no prosecutions have ever been instituted. In this field therefore the Commission cannot urge the hypothesis of special knowledge based upon experience as an offset to the hypothesis of overall wisdom of Congress.

There is no escape from the fact that this argument of the Commission is but a thinly disguised attempt to assert power to impose sanctions under a more euphemistic label.

The only other possible argument grounded on the Commission's administrative convenience is so tenuous that it is not even explicitly urged. We state it openly for them to dispose of it:

> The facts shown on the administrative record demonstrate that respondent will, if its license is renewed, continue to program and operate Station WOKO in the public interest for its renewal license period. However, at the end of that period it will be required to file a renewal application for the next succeeding period. Because of the past misrepresentations shown on the record the Commission will want careful verification of the statements in such application. But

that means more than ordinary processing. Now because the Commission has so many applications it should be excused in advance from considering an application requiring such an expenditure of administrative labor and is therefore justified in preventing the filing of such a renewal application by deleting Station WOKO.

Even if the premise of special processing were sound (we show it is not, Section III B 1), *infra*) the Commission cannot avoid passing on the merits of any future application by respondent for station license whatever happens in this case. The provisions of Section 309(a) of the Act are mandatory and control. The Commission itself has explicitly so held. *In the Matter of John H. Stenger, Jr.*, F. C. C. Docket 6723, May 29, 1946.

B. Pickard's "beneficial ownership" of 24% of respondent's stock was not material under the Communications Act of 1934, as amended.

The Communications Act (as did the Radio Act of 1927) evidences a Congressional concern that the Commission "discover and prevent any alien, criminal, or other improper control of radio broadcasting stations, and to guarantee so far as possible an independent, wholesome policy in management and operation." *Heitmeyer* v. *F. C. C.*, 95 F. 2d 91, 99. As the court below pointed out in that case, the Congressional concern is manifested in the language found in the Act. For example, in laying down its restriction to prevent alien control of corporate licensees of radio broadcast stations, it enjoins the Commission from issuing a license or permitting a license to be transferred to a "corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned *of record* or *voted* by aliens or their representatives." (Section 310(a)(4) (Italics supplied.). It is evident that the Congressional concern is not with the identity of a person who may receive stock dividends from a licensee corporation, but with whether a person who is legally empowered

to vote more than 20% of the stock or to exercise any other right of a registered stockholder is an alien.

It would obviously not be a violation of the Statute for the Commission to permit a guardian of an alien infant to invest a portion of the infant's estate in radio station stock provided that the guardian was an otherwise qualified citizen of the United States and that the alien infant had no control over the guardian but was merely to be the beneficiary of stock dividends. Nor would it be a violation of the Statute for the American Red Cross to purchase radio station stock with funds given it to endow rehabilitation activities for citizens of other countries. The dividends of the stock in such a case would, of course, go to the benefit of aliens as would the proceeds of the sale of such stock by the Red Cross, but the alien beneficiaries would have no right or power to exercise any control over the radio station operation. To cite another example, the Commission is not infrequently called upon to approve the transfer of control of stock in a radio station licensee corporation to an executor or administrator of an estate. In such a case it is the qualifications of the administrator, although he is certainly not the beneficial owner of the stock, rather than the qualifications of the heirs or legatees whose identity may not even be known at the time of the approval of the transfers which determines whether or not the Commission will consent to the requested transfer. In short, it is manifestly not the purpose of the Act to restrict the distribution of profits of a radio broadcast station to persons who by definition are qualified to become licensees or hold a controlling stock position in a licensee corporation.

In the instant case two facts stand out with respect to Pickard's ownership of 24% of respondent's stock. First, it did not give him, nor did he desire to have, any control over any of respondent's actions; and second, he never from the time respondent corporation was organized nearly fifteen years ago, attempted directly or indirectly in any way whatsoever to exercise any rights or prerogatives as a stock-

holder other than the right to collect dividends himself or to have such dividends paid to a nominee of his choosing.

The arithmetic of respondent's stock distribution which, as the Commission formally finds in its decision, (R. 23) was not fortuitous but was designed to prevent Pickard from exercising any control of respondent corporation, precluded any voting of Pickard's stock from ever having the slightest significance at any stockholders' meeting. Any issue acted upon at such a meeting would be determined by Smith and Curtis if they voted the same way, or by Curtis and The Press Company if they voted the same way, or by Smith and The Press Company if they voted the same way. This is obvious since Smith and Curtis each hold 25½%, a total of 51%; Curtis and The Press Company hold 25½% and 25% respectively, making a total of 50½%; and Smith and The Press Company hold 25½% and 25% respectively, a total of 50½%. All corporate action by respondent, therefore, was necessarily subject to the absolute control of any two of these three stockholders. It is consequently indisputable that the remaining 24% of the stock was a factor of no consequence whatsoever, so far as control of the respondent corporation was concerned. Even assuming that Pickard could at any time after the issuance of the stock have voted it, and assuming further, (*contrary to fact,*) that he did vote it, any such vote would have been meaningless. So far as anything except dividends was concerned Pickard might as well have had *one* share as 240 shares. He would in fact have had no less control, had the 240 shares been non-voting shares. He would have had as much if instead of stock he had an assignable contract for 24% of the profits of the respondent corporation before dividends and after taxes. Therefore, no non-disclosure, concealment, or misrepresentation concerning the ownership of the Pickard's interest in this stock operated, or could have operated, in any way to affect the Commission's duty to make a determination concerning the control of respondent corporation and take any appropriate action upon such

determination. All of the facts necessary to make any determination concerning the identity of persons who could or did control respondent corporation were supplied to the Commission by Smith on behalf of respondent. (See Sec. 310(b).)

The Commission's decision (conclusion 3, R. 36) contains the following statement of reasons why it was required to know the identity of the Pickards as the persons having beneficial ownership of 24% of respondent's capital stock:

> "3. In administering its statutory duties under the Communications Act of 1934, this Commission is called upon to scrutinize carefully the applicant's qualifications, as set forth in Section 308(b); to determine whether the citizenship requirements of Section 310 have been met; to inquire whether the applicant or parties in interest have been adjudged guilty of violating the antitrust laws as set forth among other provisions of Section 311 and Section 313. In deciding whether the proposed operations would serve "public interest, convenience or necessity," consideration must be given to the character, background, and training *of all parties having an interest* in the proposed license. It is, therefore, apparent that the performance of this statutory duty requires full information about *each of an applicant corporation's stockholders.* The failure in this case to disclose that the Pickards were stockholders in WOKO, Inc., prevented a determination of their qualifications and fitness under the Communications Act."

It is conceded that there was no concealment of antitrust conviction involved in this case. (The specific questions in the renewal application as to this point were categorically answered (see R. 8, 13) and these answers are not challenged.) Nor was there any concealment of stock ownership held "of record or voted by aliens". (Pickard's citizenship is not merely conceded but had been affirmatively passed upon by the Commission, else he could not have held office as a Vice President of Columbia, the licensee of sev-

eral radio stations.) The only charge is concealment of "benficial" ownership.

The italicized words quoted on p. 30 paragraph furnish the clue to the lack of relevance in the last sentence of the Commission's conclusion. The statute does not require, and the Commission does not, by rule or regulation, application, form or report, or by any procedure formal or informal, either give consideration to or seek facts concerning "the character, background and training of *all* parties having an interest" in a proposed licensee—neither does it seek "full information about *each* of an applicant corporation's stockholders". The concern of the Commission is, in practice, quite properly confined to the qualifications of those whose financial interest or stockholding gives them control or a substantial measure of control over the corporation. Information relating to others is only sought to determine whether such control exists.

The Government will not deny that the reason why the Commission requests information as to the identity of persons holding 10% or more of the stock of an applicant for a license or of a licensee corporation is that under some circumstances such persons, although not controlling a majority of the stock, may nevertheless be able to wield a strong, if not decisive, control over corporate action. Such working control, of course, can exist only where a majority of the stock is not held closely, as, for example, in many large corporations where the largest single block of stock owned by any individual may be not more than 10 to 15 or 20%. In such a case a 10% holding concentrated in any one person may become an important factor in potential control. But that is not this case. The conclusion is inescapable that the Pickard stock ownership in respondent corporation was and is a fact of no consequence to the Commission as a licensing body; and that the failure of respondent through its officers to disclose the facts with respect to the Pickard ownership of such stock in no way frustrated, hampered, or impeded the Commission in the discharge of its functions,

or respondent in the discharge of its responsibilities as a licensee.

It is disconcertingly easy to confuse the effect upon control (or disqualification through proscribed alien interest) of a 24% stock interest in a hypothetical case, which may justify an arbitrary requirement of disclosure of such interest in all cases, with the question of its importance in any actual case. It may not be material that the facts in many, if not most cases, will show that a 10% stock interest constitutes neither a factual nor a legal possibility of control—it may be enough that there is a probability that in some cases the possibility will exist, to justify a regulation requiring disclosure in all cases of the identity of persons holding 10% or more of the stock of a corporate applicant or licensee. It is not necessary here to contest the validity of such a requirement. It is enough to point out the obvious fact that any requirement of disclosure of less than 50% will elicit facts in at least some cases which are of no consequence. For example, if A owns 50.001% of the stock of an applicant or licensee, no control can be exercised by the owner or owners of the remaining 49.999% of the stock. (In fact, barring proportional representation provisions in the charter or by-laws, no audible voice in corporate affairs in such a case is possible.)

It is, of course, immediately obvious that required disclosure with respect to smaller and smaller stockholdings will elicit more and more facts, a lesser and lesser percentage of which will be material. This, to repeat, is not an argument against the validity of a regulation requiring such information, but records an obvious, though frequently overlooked, observation concerning the operation of such regulations. The point we make, and it is crucial, is that although such a regulation is *not necessarily* shown to be invalid because in operation in a particular case it produces a trivial or meaningless result—the result it produces is neither important nor material in a particular case simply

because the hypothetical (or actual) case which justified it is of extreme importance.*

Justifying repetitiousness by the importance of the point, we restate it in terms of alien ownership. Assume that the Commission, in order to insure that no corporate licensee will have 20% or more of its stock owned by aliens, promulgates a regulation requiring the submission of information by corporate applicants for license and by corporate licensees showing affirmatively that 81% of the stock of such corporations is held by citizens of the United States. We may assume further, without any discussion, that such a regulation would be valid and that refusal to comply with it or purported compliance through misrepresentation would justify the imposition of a criminal penalty. We may safely presume that such a regulation in the case of corporate licensees would not, as of today, produce in any single case information showing proscribed alien ownership. Obviously the fact that no information evidencing improper alien control would be filed in response to this regulation, would not be a sound argument against the validity of the regulation. If in response to this regulation some corporate licensee reported that a substantial block of its stock was held by A, a citizen, whereas, in fact it was held by B, also a citizen, the regulation would be violated just as much as if B, the real stockholder, were an alien, notwithstanding that the information supplied would not have been calculated to deceive the Commission on the question of citizenship, would not have affected any action the Commission is required to take because of citizenship,

* To illustrate by an apt, if somewhat pedestrian example: A 6 mile per hour speed limit in a school zone may be amply justified as a protection to kindergarten children. Jones, who is convicted of driving through the zone at 20 miles per hour, cannot be charged with wanton disregard of human life if he (admittedly and correctly) believed that all of the children were at the circus when he drove past the school. Guilty of violating the ordinance made and provided to protect the life and limb of young children, Jones is nevertheless not guilty of wanton or careless disregard of human safety—or lacking in qualification to operate an automobile.

and would not have affected the qualifications of the corporation insofar as citizenship is concerned. In a consideration, however, of whether the license of the corporation should be renewed, very different considerations would obviously apply. If the amount of stock involved was 20% or more, the Commission could not renew the license if B were an alien; it could not refuse to do so if B were a citizen and the violation of the regulation could not be shown to justify a conclusion of lack of responsibility in the corporation involved.

It is a plausible *non sequitur* to argue that, since it would be illegal to license or renew the license of a corporation more than 20% of the stock of which was held by an alien; and that concealment of the identity of a stockholder holding more than 20% might well be for the purpose of inducing an illegal granting of the application; any applicant guilty of concealing a 24% stockholder thereby proves itself irresponsible and unreliable to a degree that no finding of its ability to operate in the public interest, convenience, or necessity could possibly be made; and therefore the renewal application of such a corporation should be denied. It is indeed difficult in this case *not* to consider the failure to disclose facts with respect to the ownership of 24% of the respondent's stock in terms of what might have been the effect of such a nondisclosure or concealment had Pickard been an alien or had the corporation been so set up that through it he might have exercised a control not known to the Commission, or approved by it. Such speculations point beguilingly to the conclusion that respondent's renewal should have been denied. They are, however (notwithstanding that they might be relevant to a consideration of the validity of the Commission's requirement of disclosure), entirely irrelevant in a proceeding not having for its purpose the imposition of punishment for violation of the regulation, but restricted to the question of whether respondent is a qualified licensee; for on the question of respondent's qualifications, it is not what might have been the purpose

and effect of a concealment or nondisclosure of the substantial stock interest *in some other case* that controls. Respondent's qualifications insofar as they are affected by any other nondisclosure require consideration of the purpose and the effect of the nondisclosure that actually occurred.

It cannot be assumed, in endeavoring to relate any culpability that respondent may have to its qualifications, that respondent was trying to conceal an illegal alien participation, or a hidden working stock control. Facts rather than assumptions must be relied upon, and the facts show that Pickard was qualified to hold a minority stock interest in respondent corporation. They also show that the 24% stock interest attributed to him by the Commission was not, and could not have been, a factor in the control of respondent corporation. Nor can it be assumed that the purpose of any concealment of the Pickard interest was to mislead the Commission on a matter which was, or was thought to be, of concern to it, or that any such concealment was intended to or did induce or influence the Commission to take any action or refrain from taking any action it would not have taken had a full disclosure been made. The contrary facts shown by the record and not denied by the Commission must determine these questions also. In short, it is submitted that, even if a violation of a proper Commission regulation and the propriety of the imposition of some penalty therefor in a proper proceeding be conceded, the uncontradictable facts showing the trivial and inconsequential nature of the concealment, the admitted fact that its motivation had nothing whatsoever to do with the Commission, and the fact that the concealment itself in no way affected the Commission, preclude a conclusion, based upon the fact of such concealment alone, that respondent is not qualified to continue operating its station in the public interest—particularly in the face of a 15-year record of outstanding performance in the public interest in the past operation of the station.

The Government argues (Gov. Br. 35-36) that Pickard does not possess the necessary qualifications to be a station licensee, notwithstanding the facts that admittedly he is a citizen of the United States, admittedly he has never been guilty of any violation of the anti-trust laws, admittedly he held office as a member of the Federal Radio Commission (in which position presumably he acquired some knowledge of the laws, regulations and Commission policies governing operation of radio broadcast stations), and that he held office as Vice President in charge of station relations with the Columbia Broadcasting System, licensee of several radio stations, in which position it was his duty to advise and consult with radio stations affiliated with Columbia on various problems of station operation and policy. It is not necessary for the purposes of this case to argue that this background qualified Pickard to be a licensee of a radio broadcast station. It is only necessary to point out that it qualified him to hold a minority stock interest, entitling him to the dividends on 24 per cent of respondent's stock, under a stock distribution which precluded him from exercising any voice as a stockholder through the voting of such stock. Considering the fact that corporations, stock in which is admittedly beneficially owned by infants, incompetents, unknown heirs and others possessing none of these qualifications, not to mention corporations whose stock is bought and sold on the market, have been found by the Commission to be qualified to operate broadcast stations, it is hardly necessary to labor this point. (The Commission apparently does not dispute Pickard's qualifications to hold this stock since it made no adverse finding with respect to Pickard's qualifications in its decision.) There is no way in which counsel for the Commission can argue with even surface plausibility that the fact that Pickard received himself or had the power to designate the person who would receive dividends on 24 per cent of respondent's stock was or could have been material in any Commission proceeding involving the renewal of license of Station WOKO.

It was the position of the court below that the lack of materiality of the facts concealed in the instant case, the admitted fact that the concealment was not intended to and did not influence the Commission in any way, and the admitted fact that the motivation for the concealment was a purely private and completely unrelated business concern of Pickard's, out of which no other stockholder, officer, or director of respondent or respondent itself received any benefit whatsoever, are sufficient in and of themselves to make the non-disclosure meaningless so far as respondent's qualifications to operate a radio broadcast station are concerned. The Government has failed to show any reversible error in this holding.

It is obvious from the foregoing that the Court below correctly stated the real question in the case as being:

> "Simply stated, the question in this case is whether it is logical and rational to say that a licensee cannot be entrusted with further responsibilities for the sole reason that, over a term of years, one of its officers has concealed from the Commission the identity of a beneficial owner of twenty-four percent of its capital stock" (R. 71).

III.

The Court Below Properly Held That It Is Not "Logical and Rational to Say That a Licensee Cannot Be Entrusted with Further Responsibilities (to Program and Operate a Radio Station) For the Sole Reason That, Over a Term of Years, One of Its Officers Has Concealed From the Commission the Identity of a Beneficial Owner of Twenty four Per Cent of Its Capital Stock."

A. The Government's contention that the court below held that the Commission is required to consider and pass upon unrelated qualifications of an applicant for renewal of license properly found to lack an essential qualification—or to possess a basic disqualification—is based upon an improper interpretation of the opinion.

The Government contends vigorously (Gov. Br. 41-49) that the decision of the court below is in error because it requires the Commission to consider unrelated factors such as a station's past program service and the licensee's investment, in a case where it has found the station applicant for license renewal wanting in the minimum character requisites to serve public interest, convenience or necessity.

The court below *did* say that the Commission's decision should have given consideration to these points as well as the question of whether earlier disclosure of the true facts with respect to the Pickards' receipt of dividends would have resulted in refusal to renew the station license on a previous application or in refusal to grant permission to construct it. The court *did not*, however, even by remotest implication suggest that additional findings would have been necessary had the Commission's finding that respondent could not be "entrusted with the responsibilities of a licensee" been well founded.

The court very carefully considered the question of whether what it called the Commission's "warranted conclusion" of misrepresentation would justify denial of the application standing alone, and found that it would not, as the Commission had no power to refuse a renewal of license to punish respondent (a point the Government now concedes, *supra* pp. 6-7). The court also considered the question of whether it could find on the record in the light of the statute—since there was no Commission finding that disclosure of the true facts concerning Pickard's receipt of dividends would have been material in that they would have justified or required any action by the Commission on past application different than it had taken—any basis was found for holding the misrepresentations and concealments material. The court could find no such basis.

The Government now suggests (Gov. Br. 35-36) that Pickard was not qualified to receive dividends on respondent's stock because:

(a) he was disloyal to his employer Columbia Broadcasting System; and

(b) he was a network official and it *might* be adverse to the public interest for a network official to hold stock in an independent radio broadcast station.

As to (a) it is (1) a highly doubtful inference from the testimony (Tr. 115-116, 164-165, 167-168, 171) and (2) it was *not* found to be a fact by the Commission in its decision or in any document filed by it pursuant to Section 402 (c) of the Act. The Commission, therefore, as an expert body either did not think the contention advanced by its counsel in the brief filed in this Court sound—or it did not consider the matter when the case was before it.

As to (b) the Act is silent. Assuming, however, that the Commission may nevertheless speak authoritatively on the point *it did not do so.* Congress has not authorized the Solicitor General nor the Commission's legal staff to determine policy in this field. But even if it had, any policy so established cannot stand against a formal Com-

mission proclamation on the point. The Commission has considered the question; on June 6, 1946, it said:

> "The testimony presented by the joint petitioners in support of their respective applications indicates that both petitioners are legally, technically, financially, and otherwise qualified to construct and operate a standard broadcast station and that the public interest would be served by the granting of their applications. The application of Wabash Valley Broadcasting Corporation, however, raises a question of policy since one of its stockholders, Robert E. Hinckley, is an officer of the American Broadcasting Company. In the Commission's opinion, a serious question is raised concerning the desirability of a network official or stockholder owning any interest in a broadcast licensee, since other stations operating in the same community would be at a competitive disadvantage in attempting to secure a network affiliation with the network in question. The Commission is aware, however, that this is a question of broad application, and at the present time the Commission is considering the promulgation of a proposed rule governing this matter, upon which interested persons would be given an opportunity to be heard. Mr. Hinckley has advised the Commission that if a policy is adopted by the Commission against ownership by network officials of interests in broadcast licensees, he would relinquish his interest in the applicant. On the basis of this understanding, the Commission concludes that there is no objection to a grant of the application of Wabash Valley Broadcasting Corporation." (*In re application of Wabash Valley Broadcasting Co.*, F. C. C. Docket 6924, June 6, 1946.)

It is of the greatest significance that, although participation in independent station ownership by network stockholders or officials is far from uncommon, the only official statement of the Commission on the point is the one quoted above. That the above-expressed policy would have no application to the instant case is evident, since the facts of the instant case show without dispute that when Pickard

obtained his stock interest in respondent *WOKO was the only broadcast station in Albany.* (When this case was decided there was one other station in Albany—*but* 67½% of that station was and is owned by the same persons who own 76% of respondent's stock. R. 23-24.) Beyond controversy, therefore, the court below was, despite its attempt to find a justification for the Commission's conclusion of respondent's "untrustworthiness", unable to find in the Commission's published precedent or policy any basis for holding the actual facts as to the Pickards' receipt of dividends material or significant.

The court pointed to the absence of any finding by the Commission on the obviously relevant question of WOKO's past operation and turned to the administrative record to see whether the evidence there would require an adverse finding. Examination of the record disclosed—and this is not disputed by the Government—that there was no evidence whatsoever of any kind upon which a finding of improper past operation could be based. On the contrary the evidence, not disputed or impeached, showed that the station had always operated in the public interest. The court below therefore concluded that the Commission's failure to make an adverse finding on this point which would have furnished support for its conclusion of "untrustworthiness" was no mere formal or technical omission.

It is plain from the decision of the court below that if the Commission's findings had rationally supported its conclusion that respondent lacked fitness to be a licensee, the Commission's decision would have been affirmed. The court held that, in this particular case, other considerations besides the misrepresentation with which respondent had been charged should have been considered as bearing upon respondent's fitness to be a licensee. This is not the same as holding that in determining the ultimate question of respondent's qualifications it was necessary for the Commission to go beyond a proper conclusion as to the lack of any requisite qualification. There is no question but that if the

Commission had properly concluded that respondent was lacking in one requisite qualification, whether that was a legal, financial or technical qualification, or lack of "trustworthiness" to be a licensee, it would have been unnecessary for the Commission to balance the lack of one qualification against other qualifications that respondent might have possessed in order to determine whether its license should be renewed.

The court's reference to respondent's past record as a licensee was made as indicating that this had some bearing on the issue of respondent's qualifications to continue to be a licensee. Findings as to respondent's past program and technical service conceivably might have lent support to the Commission's conclusion that respondent could no longer be entrusted with the responsibilities of a licensee. Conceivably they might have supported a contrary conclusion. In any event, respondent's record of performance as a licensee over a period of some fifteen years was considered by the court below as having some bearing on the question of respondent's fitness to continue as a station licensee, and in failing to advert to respondent's past performance as a licensee, the Commission necessarily omitted one relevant factor in reaching its conclusion. Since the question before the Commission in the instant proceeding was the fitness of respondent to carry out the duties and responsibilities of a licensee, certainly the past record of the respondent in carrying out such duties and responsibilities had some relevance to the conclusion as to whether respondent did or did not possess the requisite fitness.

Nor did the court below hold, as the Government would have it appear, that the value of respondent's property devoted to broadcasting purposes had any bearing upon the qualifications of the respondent to continue to operate Station WOKO in the public interest. The court below did point out that the large investment which respondent has in physical properties is one reason why the Commission should not arbitrarily take action which would result in

the utter destruction or severe deterioration of substantial property values (R. 70). Compare the court's expression on this point with the language in the decision of the Commission in *In re Application of Buffalo Broadcasting Corporation*, decided December 19, 1945, quoted *infra* p. 53.

The Government argues that the court below overstepped the boundary between judicial and administrative functions and substituted its own judgment for that of the Commission on a matter entrusted to the discretion of the Commission by the Communications Act (Gov. Br. 40). The court below held that the conclusion that respondent could not be entrusted with the responsibilities of a radio station licensee did not follow from the finding that respondent had made a misrepresentation to the Commission, the only basic finding made by the Commission in support of its conclusion. The sufficiency of the Commission's findings to support its conclusion is a matter within the proper judicial power of the court below to determine under Section 402(e) of the Act. *Federal Radio Commission* v. *Nelson Bros.*, 289 U. S. 266. See also *National Labor Relations Board* v. *Columbian E. & S. Co.*, 306 U. S. 292, 301.

B. There is no relationship between the non-disclosure of Pickard's minority stock interest and the ability of respondent to discharge the responsibilities of a licensee to serve public interest, convenience and necessity.

The court below put this point succinctly in the concluding sentence of its opinion (R. 72):

> "Under the situation disclosed here, we conclude that the Commission acted arbitrarily in proceeding from its warranted conclusion that the stock ownership had been misrepresented to it, to the drastic decision that the continuance of the license would not be in the public interest, with the concomitant results of disestablishing an established and satisfactory radio station and of imposing upon its corporate owner the entire

loss of its good will and the serious impairment of the value of its capital assets."

The court did not seek to minimize Smith's deception; on the contrary before reaching this conclusion it pointed out that (R. 72):

> "The Commission was quite justified in feeling vexed at the deception, and perhaps would have been justified in seeking criminal prosecution of Smith, or of the appellant itself."

Nevertheless, it was impelled to hold:

> "but to say that this concealment, which did not induce or influence its former grants of renewal licenses, alone supports a conclusion that public interest, convenience, or necessity would not be served by the renewal, is in logic a non sequitur."

Respondent has for over fifteen years fully and adequately discharged its responsibilities as a licensee to render a proper technical and program service to the residents of Albany and surrounding areas, despite the concealment of the Pickard stock interest. It cannot be argued that the disclosure of the Pickard interest will prevent respondent from discharging such responsibilities in the future. The very fact that information as to the Pickard interest in respondent was concealed over this entire period, which the Government stresses as aggravating the offense, argues against, rather than in support of the Commission's conclusion as to respondent's qualifications. Only on the assumption that respondent would be less able to render a proper technical and program service to the public with the Pickard interest made a matter of public record than it was able to do while that information was being withheld, can the Commission's conclusion be sustained.

1) *It does not follow from the fact that the Pickard stock interest was concealed that respondent cannot be entrusted with the duties of a licensee to file truthful applications and reports to the Commission in the future.*

There is no basis in the record for a determination that any misstatement of fact concerning the ownership of stock in the respondent was characteristic of the statements made to the Commission regarding other matters, or that the respondent was likely to be untrustworthy in the future. On the contrary, the record demonstrates that this alleged misdeed is the only fault committed by the respondent during a period of broadcasting extending back to the earliest pioneering days of the industry. It was committed at a time when the standards consistently applied by the regulatory agency were not the same as those imposed by the Commission in recent years.* In all other respects the record of the respondent has been exemplary, and there is not the slightest scintilla of evidence in the record to connect the misrepresentation as to the Pickard ownership of stock with a possible future misrepresentation by respondent or with the possibility of harm to the public if the station is allowed to continue on the air. Moreover, a conclusion as to respondent's truthfulness and sense of responsibility, which adverts only to the misrepresentation of an immaterial fact, and does not take into consideration an unblemished record of fifteen years of complete reliability and the truthfulness on every material fact submitted to the Commission, cannot be reconciled with the requirement that the Commission must in all cases exercise a *sound or sensible* administrative discretion.

2) *The licensing experience of the Commission demonstrates that the concealment of the Pickard's stock interest does not justify the conclusion that respondent lacks qualification to continue as a licensee.*

The Commission's assumption that if a licensee is found to have made a misrepresentation to the Commission or

* See *In the Matter of Segal and Smith*, 5 F. C. C. 3.

to have concealed facts from the Commission, it automatically follows that he cannot thereafter be entrusted with the responsibilities of a licensee, can be demonstrated to be unsound by the Commission's own experience.

The licensing problem presented to the Commission by respondent's renewal application was not a novel one. There have been many instances throughout the history of the Commission and its predecessor, the Federal Radio Commission, in which applicants for new stations or renewal of license have been found to have made false representations to, or deliberate concealments from the Commission. Throughout the years there has been evolved a consistent unvarying administrative interpretation of the Commission's statutory duty in such cases.* It has always been the Commission's interpretation of the Communications Act that its duty in such cases is to consider the proof of false statements as a factor but not as the conclusive factor in determining the qualifications of a new applicant or a licensee for a renewal of license.**

In 1939 the Commission designated the renewal application of Station KIEV for hearing for reasons involving the

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* E.g. Panama City Broadcasting Co. (WDLP), 9 F. C. C. 208 (1942); Ocala Broadcasting Co. (WTMC), 9 F. C. C. 223 (1942); Red Lands Broadcasting Ass'n et al., 8 F. C. C. 473 (1941); East Texas Broadcasting Company (KGKB), 8 F. C. C. 479 (1941); Lee E. Mudgett (KRKO), 8 F. C. C. 226 (1940); Cannon System, Ltd. (KIEV), 8 F. C. C. 207 (1940); Navarro Broadcasting Ass'n (KAND), 8 F. C. C. 198 (1940); Georgia School of Technology (WGST), 10 F. C. C.—March 23, 1943; In re application of Buffalo Broadcasting Corporation, F. C. C. Dockets 6324 and 6325, December 19, 1945; In Re application of Hiawathaland Broadcasting Co. (WSOO), F. C. C. Docket 6208, September 12, 1945; In re FM Radio and Television Corporation, F. C. C. Docket 6928, October 16, 1946.

** So far as counsel has been able to discover, there is no reported case in which the Commission has refused to renew a license on the ground that the licensee had made a misrepresentation, notwithstanding that in many reported cases the misrepresentations which the Commission has found were with respect to material facts bearing directly upon the qualifications of the licensee to operate a station and the licensee's past or future proposed radio service.

station's program service. After the hearing the Commission found that the disparity between the program service proposed in the original application and the programs actually broadcast by the station indicated such a disregard of the representations made as to cast doubt on their sincerity in the first instance. In addition, the Commission found that false statements of talent expenditures were made in successive renewal applications. After reciting the facts developed by the record, the Commission stated:

> "Upon all the facts, however, it has been concluded not to deny the pending application. The record shows that attempts to improve programs have been made. An additional member has been placed on the staff with the duty of arranging programs of a civic, educational, and charitable nature. The percentage of time devoted to recorded music and to commercialization has been reduced, and the remainder of the program schedule dedicated to diversified non-recorded program material. News programs have been added and a 5-year contract entered into with the United Press. Religious programs are being prepared by the Ministerial Association. Local civic and fraternal organizations are being more actively assisted in the preparation of programs. To a substantial extent the public has come to utilize the transmitting facilities and the broadcast service." *Cannon System, Ltd.* (KIEV), 8 F. C. C. 207, 210 (1940).

In the instant case the Commission gave no consideration to the service of the station and to the scrupulous compliance by the respondent with every rule and regulation of the Commission governing both technical and program operation, nor did it even attempt to relate the alleged past misrepresentation to the future service of the station. In considering the past conduct of the respondent, insofar as its service to the public is concerned, the only possible finding that could be made as to the probable future conduct of the respondent is that it would be of the highest caliber. It is important to bear in mind that in this case the Commission did not find that the future service of the respon-

dent would not be in the public interest. It obviously could not make such a finding. This vital point was ignored by the Commission. Indeed, when the respondent offered testimony as to its program service at the hearing, Commission counsel objected to its introduction as being "immaterial and besides (*sic*) the issues." (Tr. 1036) In issuing its proposed decision, which was later made the Commission's final decision, not a word was said about the service which Station WOKO has been rendering and would continue to render to the public in the Albany area. (R. 23-28) It is our position that in the absence of any finding as to the probable future service of the station, and in the absence of any finding that respondent possessed a statutory disqualification, the Commission's action in refusing to renew respondent's license was in law arbitrary and capricious.

In a group of cases involving a number of Texas stations, the Commission found that the licenses of Stations KTBC, Austin, Texas, KNET, Palestine, Texas, KRBA, Lupkin, Texas, KSAM, Huntsville, Texas, KGFI, Brownsville, Texas, and KGKB, Tyler, Texas, had either been obtained through false and fraudulent representations to the Commission concerning their financing and ownership, or had been transferred or assigned without Commission consent, or both, in contravention of the Communications Act and the Commission's rules and regulations. In these cases, also, the Commission vacated its revocation orders on the grounds that no charge had been made that the program service of the stations was not in the public interest; that the licensees of the several stations were responsible citizens in good standing and repute in their respective communities; and that to delete the stations would deprive all the communities of valuable broadcast services. *Red Lands Broadcasting Association et al.*, 8 F. C. C. 473 (1941); *East Texas Broadcasting Co.*, 8 F. C. C. 479 (1941).

In two comparatively recent revocation proceedings, the Commission applied the criteria which respondent contends

must govern actions by the Commission which involve the possible deletion of an existing radio station. In the cases of *Panama City Broadcasting Company, Inc.*, 9 F. C. C. 208 (1942), and *Ocala Broadcasting Company, Inc.*, 9 F. C. C. 223 (1942), the Commission found that it had been grossly misled in granting the licenses of WTMC, Ocala, Florida, and WDLP, Panama City, Florida, without disclosure of the identity of the real party in interest in either application. Unlike the instant case in which the Commission found that respondent had misrepresented the beneficial ownership of an unimportant minority interest in its stock, in the *Ocala* case and the *Panama City* case the Commission found that there had been a misrepresentation as to the true owner of the entire station. In both cases the Commission found that the deception was deliberate and the culpability clear, but nevertheless vacated its prior order of revocation on the grounds that the two stations were rendering outstanding public service, that the true party in interest had demonstrated his fitness to be a broadcast licensee, and that the communities served by the stations would otherwise be deprived of an essential public service.

Respondent is not arguing that the doctrine of *stare decisis* required the Commission to renew the license of WOKO. We do not contend that the decision of the Commission in any of the cases discussed above is binding on the Commission in the sense that it could not legally reach a different result on the WOKO renewal application. We concede that the Commission's decision must be governed by the facts developed in each case. *Courier-Post Publishing Company* v. *Federal Communications Commission*, 70 App. D. C. 80, 104 F. 2d 213. We do contend, however, that the statutory criteria applicable to the determination of renewal applications are the same in all renewal proceedings. The meaning of the Communications Act does not change from case to case. The Commission's duty to consider all relevant factors bearing upon the ability of the licensee to continue to operate its station is the same

in the instant case as it was in all previous cases in which the Commission has acted on renewal applications. It is our position that the Commission's unvarying administrative interpretation of what it is required to do by the Communications Act in passing upon an application for renewal of license is correct and that its departure from the statute in the instant case constituted reversible error.

The Commission itself has recognized this principle many times. Its most recent statement on the point is found in its decision in *The matter of Powell Crosley, Jr., Transferor, and The Aviation Corporation, Transferee*, F. C. C. Docket No. 6767, decided September 6, 1945, (not yet reported). The Commission there stated:

> "A majority of the Commission, however, believe that on the full record before it the Commission has no alternative but to grant the application unless the uniform precedents of seventeen years of radio regulation are to be ignored and a complete reversal of administrative policy is to be adopted. While an administrative agency is not bound by the doctrine of *stare decisis* we believe that sound public administration demands respect for established policies. We believe that any change in policy as fundmental as the one advocated by the minority should, if it is to be effective, be brought about by legislation or by rules and regulations of general applicability. If matters of such importance are left to case-to-case decisions, basic policies can be expected to shift back and forth with changes in membership of the Commission making it impossible for the public to know from one day to the next what the policy is. We believe that administrative agencies such as this Commission have an obligation to adhere to uniform policies, and when developments dictate a change, to adopt after appropriate notice a rule of general application so as to avoid the color of discrimination in a particular case.
>
> "Moreover, acceptance of most of the minority's reasoning would, if it were uniformly applied to other cases, create a chaotic situation in the broadcast industry which, as will be shown, would cast doubt on the status of a great many licensees when they next come up for renewal."

The uniform precedents of over seventeen years of radio regulation establish beyond question of doubt as the proper interpretation of the Communications Act of 1934 and of the Radio Act of 1927 (which on this point is precisely the same) that failure to make a complete disclosure to the Commission, whether or not coupled with misrepresentations to effectuate a concealment, even of material matters, is not in and of itself a basis for holding the person responsible *lacking in qualification to be the licensee of a radio broadcast station.*

We do not for a moment suggest that the facts concerning concealment of any material matter, or any misrepresentation made to further such concealment, may not be relevant factors in determining whether or not the applicant responsible for them is qualified to become a licensee or to continue as a licensee. We do contend that other factors are of an equal, and in many cases, including the instant one, of far more importance in making such a determination. The Commission itself has consistently interpreted the Communications Act of 1934 as requiring it to evaluate all factors bearing upon the qualification of an applicant in deciding whether to grant or refuse a renewal application. "Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures . . ." *National Labor Relations Board* v. *Mall Tool Company,* 119 F. 2d 700, 702. The standards which the Communications Commission and its predecessor, the Federal Radio Commission, have consistently applied in cases involving a renewal of radio station licenses have been those bearing upon the *question of the qualifications of the applicant to continue to operate its radio broadcast station in the public interest.* Instead of applying such standards in the instant case, the Commission confined itself to a determination of whether in the past the applicant had been guilty of

violating any Commission requirement of disclosure of information. The Commission's conceded function in such cases is to determine questions of public interest, not whether individuals should be punished for past wrongdoings.

The Commission's decision on respondent's renewal application cannot be considered as establishing a new policy to be followed in the future not only because it does not purport to do so, but because it was not (as the Commission in the *Crosley* case, said any such policy should be) established by way of general regulation, and moreover, since the decision other cases decided by the Commission indicate clearly that the Commission does not concede this case to have established any such policy. See *In re application of Hiawathaland Broadcasting Co.* (WSOO), supra; *In re applications of Buffalo Broadcasting Corporation for renewal of licenses* (WKBW and WGR), F. C. C. Dockets 6324 and 6325, Dec. 19, 1945; *In re application of John H. Stenger, Jr.*, supra.

In the *Buffalo* case the Commission found that the applicant for renewal of license had, over a period of many years, concealed from the Commission in violation of its regulations facts showing that the applicant had illegally transferred rights under its licenses to third persons. In contradistinction to the instant case, where the facts withheld from the Commission did not show that respondent had acted in contravention of either the basic principles or any provision of the Communications Act of 1934, in the *Buffalo* case the Commission found that the applicant had concealed "an arrangement for the operation of Stations WKBW and WGR which is in contravention of basic principles of the Communications Act of 1934." This concealment, the Commission found, was effectuated by misrepresentations made in sworn applications and reports filed with the Commission over a period of many years. Nevertheless, the Commission did not find the applicant not qualified to be a licensee. Instead the Commission concluded as follows:

"The failure of the Buffalo Broadcasting Corporation to make full disclosure in its reports to the Commission of its agreements with the Churchill Tabernacle indicates a lack of candor and care in the preparation of the reports. While this had a direct bearing on the applicant's qualifications, we do not conclude that in this case the omissions were so serious—particularly in view of the fact that one of the basic agreements was before the Federal Radio Commission—as to require the applicant to be deprived of the value of the stations which it has successfully operated for more than fifteen years. Nor, do we conclude, that for this reason the applicant should be found disqualified to ever again operate a radio station."

It is not, therefore, necessary to argue whether or not the Commission would have power to adopt a policy which would establish that any person making a misrepresentation, however immaterial and for whatever motive, was thereby disqualified to become or continue to be a licensee of a radio station. It is sufficient on this point to mention that the Commission, either through appreciation of its lack of power to do so, or appreciation of the lack of wisdom of any such policy, has refrained from attempting to establish it.

There has never been a case in which the Commission or its predecessor, the Federal Radio Commission, has renewed a license or dismissed a revocation proceeding after finding that a licensee had made misrepresentations to it, where the station has not thereafter been operated in the public interest. In the *Ocala* and *Panama City* cases, *supra*, the Commission did not revoke the licenses notwithstanding a finding of false representations as to the true owners of the stations. Since then the Commission has renewed the station licenses with a finding that they are serving public interest. In the case of the Texas stations, *supra*, where far more serious offenses were found to have been committed than are charged against respondent, the Commission's renewal of the station licenses has proved by experience to have been in the public interest. There is no

single instance where a person whose license was renewed after he had been found to have made misrepresentations to the Commission, thereafter failed to discharge the responsibilities of a licensee. Indeed, there have been many instances in which the Commission has found that in the operation of a station a licensee has committed crimes, carrying a statutory penalty of fine and imprisonment, but such licensees have thereafter operated in the public interest. *WRBL Radio Service Station, Inc. (WRBL)*, 2 F. C. C. 687; *KXL Broadcasters (KXL)*, 4 F. C. C. 186.

It cannot be argued, therefore, that the experience of the Commission has demonstrated the reasonableness or logic of the Commission's decision in the instant case; in fact such experience has shown that the opposite conclusion has, without exception, produced beneficial results in every case in which it has been applied. If the Commission could point to some experience which demonstrates that once a licensee is found to have misrepresented, or to have concealed a fact from the Commission, such licensee thereafter proved unfit to continue operating a station, there might be a basis for argument in the instant case. But the experience of the Commission proves the contrary.

Nor can the Government find support in the experience or decisions of other administrative agencies for the conclusion reached by the Commission on respondent's renewal application.* On the contrary the decisions of the

* An examination of the cases cited by the Government (Gov. Br. 29) reveals that they in no wise support the bald proposition that a mere concealment or misstatement provides a sufficient basis for an administrative agency to deny an application for license. Briefly, the administrative agency decisions cited (Gov. Br. 29, n. 10) may be distinguished from the case in issue on the ground that in each of them the agency determined that the fact concealed was material to the licensing function required of it, the statute providing for refusal of a license for *material* misrepresentations (*In the Matter of Securities Exchange Corporation*, 2 S. E. C. 760; *In the Matter of Charles P. Rogers*, 3 S. E. C. 597; *L. P. Atwater*, 3 S. E. C. 763; *In the Matter of Mine Sales, Inc.*, 5 S. E. C. 574); and that, when the true facts were brought to light, the applicants were found to be actually disqualified (*In re Bessie Silverfarb*,

Interstate Commerce Commission, whose functions as a licensing body are much closer to those exercised by the Commission than any of the agencies whose decisions are cited in the Government's brief (Gov. Br. 29) are in striking contrast to the reasoning expressed by the Commission in its decision on respondent's application. In *Union Pacific R. R. Common Carrier Applications*, 2 M. C. C. 573, 575 (1937), the Interstate Commerce Commission stated:

> "It is quite clear, we think, that the service here contemplated is required by public convenience and necessity. Applicant's willingness and ability to carry on the operation are not questioned. The statute requires, however, that we find also that applicant is 'fit' properly to perform the services proposed and to conform to the provisions of the Act, and our require-

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3 A. D. 880; *Federal Storage Warehouses, Inc.*, 43 M. C. C. 673; *Burbridge Common Carrier Application*, 14 M. C. C. 412). The decisions of the Office of Price Administration (*In the Matter of Tramor Cafeteria, Inc.*, 3 O. P. A. Op. and Dec. 6215; *In the Matter of Maynard Wood*, 3 O. P. A. Op. and Dec. 6220; *In the Matter of Mark C. Bloome*, 3 O. P. A. Op. and Dec. 6208), are plainly distinguishable in that they involved suspension orders which were emergency measures, immediately required to stop "leaks" of scarce materials during Wartime. The Civil Aeronautics Board decision (*Hassan Ali Easmeil*, Docket No. SR-1056, Mar. 27, 1945) involves no misrepresentation in an application for license, but revocation of an existing operator's permit, because the permittee had altered it to show an authorization greater than was actually granted, coupled with the fact that the permittee was found guilty of cheating in an examination for an instructor's license.

Of the Court decisions cited in support of the same proposition (G. Br. 29, nn. 11-12) all except three (*Great Western Broadcasting Ass'n, Inc.* v. *F. C. C.*, 94 F. (2d) 244 (App. D. C.); *Archer* v. *S. E. C.*, 133 F. (2d) 795 (C. C. A. 8); *Talbert* v. *Sims*, 143 F. (2d) 958 (C. C. A. 4)) involve permits under the National Prohibition Act or Federal Alcohol Administration Act, under both of which, because of the nature of the business licensed, the licensing agency was given an almost absolute discretion in determining the qualifications essential to obtain a permit to engage in the regulated business. Moreover, the cases cited by the Government may be distinguished from the present case on the ground that in each of them there was found either a concealment of the real party in control of the applicant (*National Grain Yeast Corp.* v. *Mitchell*, 51 F. (2d) 500 (C. C. A. 3); *Wynne* v. *Romonat*, 46

ments, rules, and regulations thereunder. Some question as to applicant's fitness has been raised by its unauthorized commencement on December 21, 1936, of bus service for the carriage of interstate passengers and their baggage over the route hereinbefore described and by its maintenance of that service until the end of the winter season, April 1, 1937, although previously warned that the described operations were in contravention of the Act. Nevertheless, we do not deem it necessary to review here the evidence respecting this phase of the matter, for proceedings have been instituted against applicant in the United States District Court in and for the District of Idaho, Central Division, on account of these unauthorized operations, and, moreover, it is our understanding that they have not been resumed since the beginning of the summer season at the Lodge on July 1, 1937, by conducting these unauthorized operations, applicant rendered itself liable to prosecutions and, upon our initiative, it

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F. (2d) 29 (C. C. A. 3); *Newark Bay Cereal Beverage Co.* v. *Wynne*, 57 F. (2d) 83 (C. C. A. 3); *Thomas J. Molloy & Co.* v. *Berkshire*, 143 F. (2d) 218 (C. C. A. 2); *Archer* v. *S. E. C.*, 133 F. (2d) 795 (C. C. A. 8); *Levers* v. *Anderson*, 153 F. (2d) 1008 (C. C. A. 10)); or a finding that the parties whose interest were concealed were, because of past misconduct, disqualified under the statute to have an interest in a liquor license (*Middlesboro Liquor & Wine Co.* v. *Berkshire*, 133 F. (2d) 39 (App. D. C.); *Roumanian American Winery* v. *Morgenthau*, 152 F. (2d) 452 (C. C. A. 2); *Thomas J. Molloy & Co.* v. *Berkshire*, supra); or a finding that the applicant was not in fact financially or otherwise able to conduct the business under the license applied for (*Great Western Broadcasting Ass'n* v. *F. C. C., supra; Doran* v. *Judd*, 31 F. (2d) 108 (C. C. A. 3); *National Grain Yeast Corp.* v. *Mitchell*, supra). In *Higgins* v. *Mills*, 22 F. (2d) 913 (C. C. A. 2), a revocation proceeding there had been a past record of unlawful operation under the license which had been granted. The case of *Talbert* v. *Sims*, supra, is not in point since the decision turned on the question of whether the acts of an agent in violation of the rationing regulations of the O. P. A. could be attributed to his employer.

The cases referred to above illustrate the importance of relating the fact that false statements have been made, to the fitness of the person making the false statement to effectuate the policies sought to be accomplished by the regulatory statute. None of the cases offer even a close parallel to the point at issue in the instant case.

is being prosecuted. The matters of guilt and, if guilt be proved, of punishment are now before the court for determination. Assuming that applicant should be punished, it does not follow that the public should also, in effect, be punished by being deprived of service which the evidence shows that public convenience and necessity require. In *House Contract Carrier Application*, 1 M. C. C. 725, and other cases, we have found that the fact that an applicant may have violated the Act is not an absolute bar to the grant of a certificate or permit."

In *Leatham Brothers Contract Carrier Application*, 2 M. C. C. 639, 640-641 (1937), the Interstate Commerce Commission again expressed a view, consistent with decisions of the Federal Communications Commission, rendered prior and after the decision on respondent's application, but directly in conflict with the views expressed by the Commission in the decision in the instant case:

"As stated in *Garritson & Guhrt Contract Carrier Application*, 1 M. C. C. 751, 753, violations of the Act and of other laws are facts, which properly may be considered in determining the fitness of an Applicant, but they are not an absolute bar to the granting of a certificate or permit. Upon consideration of all the fact of record, including those relating to applicant's unlawful operations, we are of the opinion that applicants are fit to perform the service and willing to conform to the provisions of the Act and our requirements, rules and regulations thereunder."

3. *There is no logical nexus between the Commission's findings and its conclusion.*

There is utterly lacking in the Commission's decision the necessary connecting link between the finding that a misrepresentation was made to the Commission and the ultimate conclusion that respondent cannot be entrusted with the responsibilities of a licensee. If the Commission had also found that the facts withheld from the Commission were material to a determination of the respondent's qual-

ifications, that is to say, that the disclosure of Pickard's interest would have justified or required a denial of respondent's license, such a finding would lend some support to the Commission's conclusion.* Of course, no such finding was or could be made in this case. If the Commission had found that the purpose of the concealment had been to further some pecuniary or personal aim of respondent, or had been instigated by the respondent or any of its officers, directors or stockholders to induce the Commission to take some action or to deter the Commission from taking any action, that too would have lent some color of reasonableness to its conclusion. But the record shows that the concealment was to satisfy personal business considerations of Pickard, and the Commission so found in its decision. If the Commission had found that the purpose or effect of the concealment was to hamper or impede the Commission in the discharge of its functions, this might also have tended to connect up in some measure the charged misrepresentation with the conclusion of untrustworthiness. But the Commission made no such finding. (On the contrary it found (R. 31, 34-35) that Smith, who is charged with having made the misrepresentation, repeatedly sought to obtain consent from Pickard to make full disclosure to the Commission concerning his interest in respondent corporation.) And it is clear, as shown above, that the facts as to Pickard's interest were of no importance to the Radio Commission or the Communications Commission in the exercise of its licensing function.

If the Commission had found that the respondent's failure to disclose the Pickard interest, immaterial though it may have been in this particular case, was characteristic of the manner in which respondent answered inquiries of the Commission on other matters, or prepared its applications and reports, and was merely one of many concealments or false representations that respondent had made

* Cf. *In the Matter of Revocation of Station License of Station WSAL*, 8 F. C. C. 34, 37.

on sundry unrelated matters, a more plausible connection between the Commission's finding and conclusion would thereby have been supplied. But the record shows that such a finding was not and could not be made because, with the exception of this single non-disclosure, the respondent's record in this respect is unblemished. If the Commission had found that respondent's attitude as a licensee had been one of defiance of the Commission and recalcitrant refusal to accede to the Commission's regulatory jurisdiction, its conclusion might have been supplied with some of the lacking support. But the record shows (R. 54-55) that the respondent offered first to buy up the Pickard stock, if that would be satisfactory to the Commission, and later respondent proposed a complete reorganization of the corporation, subject to the Commission's approval, which would have guaranteed that no person now connected with respondent corporation would have any control over the future operations or policy of the station.

It is not suggested that the foregoing considerations are the only ones that could possibly supply a connecting link between the Commission's finding of concealment and its conclusion in the instant case. Respondent does contend, however, that absent any connecting link between the finding of concealment and the conclusion of untrustworthiness the Commission's conclusion must in law be deemed arbitrary and capricious. *Saginaw Broadcasting Co.* v. *F. C. C.*, 68 App. D. C. 282, 96 F. 2d 554, (*cert. denied*; 305 U. S. 613).

Respondent is not arguing that licensees of radio stations may make false representations to the Commission with impunity. The same sanctions that apply with respect to the making of false statements to any other government department or agency apply with equal force to persons dealing with the Federal Communications Commission. (See e. g., 18 USC § 80.) Congress evidently conceived them to be adequate. The Commission apparently does not. It lies with the Congress, not the Commission, however, to change this.

Respondent contends that the Commission cannot establish as an absolute qualification for license, or renewal of license, a record of unwaivering truthulness on immaterial as well as material matters. In the law, as in every field of human experience, the distinction which respondent is here making between material and immaterial false statements is recognized. One need not undertake a defense of false statements to assert that the law does not contemplate in determining civil liability that private citizens in their dealings with each other or with their government are, or need to be truthful about matters which are not material in a legal sense. It is not a condonation of the making of immaterial false statements, but a recognition that neither judicial nor executive intervention is warranted to insure truthfulness in immaterial matters, that underlies the policy of the law which allows no recovery in an action for fraud or deceit unless the misrepresentation which is the basis of the action is a material one. Prosser on Torts, 1941 § 88; *Ming* v. *Woolfolk*, 116 U. S. 599, 602. In the case of false swearing, no criminal liability attaches unless the swearing is with respect to a material fact. 18 USC § 231; see *Hill* v. *U. S.*, 54 F. 2d 599; *Blackmon* v. *U. S.*, 108 F. (2d) 572.

The Government cities two criminal cases (Gov. Br. 33) *Kay* v. *U. S.*, 303 U. S. 1, and *U. S.* v. *Presser*, 99 F 2d 819, presumably to support its contention that the immateriality of the concealment of the Pickard stock interest in determining the qualifications of respondent to continue as a licensee was of no consequence. Of course, in a criminal prosecution for willful misstatements to a Government agency it is not necessary to prove that the agency was in fact misled by the false statements any more than in a prosecution for perjury it is necessary to prove that the jury did in fact rely upon the false testimony. But in either case the false statement must be with respect to a fact which, if relied upon, would have had some influence on the decision of the jury or the Government agency, and not with respect to a fact which in no way could possibly have

influenced a decision. In the *Kay* case, it is true that the false statement made by the defendant did not influence the HOLC because it was detected before the agency took any action in reliance upon it, but there is no question but that if the agency had relied upon the false statement, there would have resulted a financial loss to the Government. In the *Presser* case the defendant made false statements with respect to the payment of prevailing wages on a WPA contract under circumstances where his commitment to pay prevailing wages was a condition precedent to the awarding of his contract. In that case the false statements were obviously as to a fact which was material and relied upon by the Government agency.

Certainly Congress did not intend in the Communications Act to authorize the Commission to undertake a moral reform. It seems hardly necessary to point out that broadcasting does not possess any peculiar or special attributes, which distinguish it from other fields of endeavor, such as to require that persons who obtain licenses for broadcasting stations shall be more moral, more truthful or more saintly than persons engaged in other businesses. The nature of the regulatory jurisdiction which the Commission exercises over licensees is not so different from that which other regulatory agencies exercise in other fields as to require a special moral character in persons operating radio stations. (Cf. 15 USC § 77 www.) If there is an inevitable connection between making false statements to the Commission and a disability to operate a radio station in the public interest, it lies with Congress to specify it. It certainly is not within the province of the Commission to add new qualifications to those laid down by Congress. Cf. *Tri-State Broadcasting Company* v. *F. C. C.*, 68 App. D. C. 292, 96 F. 2d 564; *Stahlman* v. *F. C. C.*, 75 App. D. C. 176, 126 F 2d 124; *F. C. C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470.

The argument that the concealment of information is in and of itself a basis for refusing to renew the license, without regard to whether the Commission places any reliance

upon the information withheld, and without regard to the probable future conduct of the licensee and the effect upon the public of deleting the station, may offer a convenient rule-of-thumb procedure for the Commission to follow, but it overlooks the duty of the Commission to be governed by statutory criteria and considerations of public interest. Ease of regulation is no justification for arbitrary administrative action.

C. The Use by Congress of the Word Character in Section 308(b) Of The Act Furnishes No Support For The Commission's Refusal To Renew The WOKO License.

The Government's brief (pp. 25-26) lays great stress on the use of the term "character" in § 308(b) of the Act. It is not entirely clear whether its conclusion is:

a) one who cannot be "entrusted with the responsibilities of a licensee" is, therefore, lacking in the necessary character or fitness to operate a station,

or,

b) one who conceals and misrepresents facts in applying for a license or renewal thereof is by that fact shown to be lacking in the necessary character or fitness to operate a station,

or whether the Government is making both contentions. Neither argument furnishes any reason for reversing the court below.

We concede that a conclusion of character disqualification follows from a conclusion of lack of trustworthiness to program and operate a broadcast station in the public interest. We go further and concede that no explicit finding on "character" is necessary in such a case; for a properly grounded conclusion of "untrustworthiness to operate a station" is a sufficient basis for refusal to renew a station license. The defect in the Commission's decision and the

basis of reversal by the court below lies in the fact that the Commission made no findings adequate to support its conclusion that respondent could not for any reason be relied upon to continue the operation of WOKO in the public interest, and in the fact that the record furnishes no support for any finding that respondent cannot be trusted to program and operate WOKO in the public interest. Since the conclusion of "untrustworthiness" was unsupported, any conclusion of lack of "character" predicated on the defective conclusion of untrustworthiness would be equally unsupported.

The Government's argument (Gov. Br. 25-29) also fails when viewed as the assertion that the finding of misrepresentation would justify a finding of lack of character on some other basis. On this point it couples Section 308(b) of the Act:

> ". . . the application 'shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the applicant to operate the station'" (Italics are the Government's.)

with Section 3.24 of the Commission's regulations:

> "An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
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> • • •
>
> "(d) That the applicant is legally qualified. That the applicant (or the person or persons in control of an applicant corporation or other organization) is of *good character* and possesses other qualifications sufficient to provide a satisfactory public service." (Italics ours.)

and suggests that one who conceals facts through misrepresentation does not have good character. The short answer to this is that the Commission made no finding that

respondent did not have "good character". The uniform precedents of the Commission establish that the making of misrepresentations to the Commission does not in itself justify a conclusion of lack of character to become or continue a licensee of a broadcast station.* In the absence of any expression of intention by the Commission in its decision to depart from these cases it is not open to counsel to argue here that they have no application.

The Government's "character" argument, therefore, if it implies merely that trustworthiness is an essential element of character or fitness to program and operate a broadcast station in the public interest, fails as an untenable bootstrap contention unless the conclusion of "untrustworthiness" can stand; if the argument implies that "character" should be substituted for "untrustworthiness" because it means something different, then it fails because the Commission made no finding that respondent was wanting in any other essential element of character or fitness to continue to program and operate Station WOKO in the public interest.

CONCLUSION.

The court below properly held that the Commission's refusal to renew the license of Station WOKO was an unlawful imposition of a sanction, and cannot stand as a valid determination by the Commission that respondent does not possess the necessary qualifications to continue to operate Station WOKO in the public interest, convenience and necessity.

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* See cases cited p. 46.

Wherefore, respondent respectfully prays that this Court affirm the decision of the United States Court of Appeals for the District of Columbia reversing the decision of the Federal Communications Commission denying respondent a renewal of license for radio broadcast station WOKO.

Respectfully submitted,

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November 1946.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1946.

Federal Communications Commission, Petitioner, *v.* WOKO, Incorporated.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[December 9, 1946.]

Mr. Justice Jackson delivered the opinion of the Court.

WOKO, Incorporated, for some years has operated a radio station at Albany, New York, and appears to have rendered public service of acceptable quality and to be able to continue. The Federal Communications Commission refused to renew its license because of misrepresentations made to the Commission and its predecessor as to the ownership of the applicant's capital stock. Two hundred and forty shares, being twenty-four per cent of its outstanding capital stock, was owned by one Pickard and his family. For some twelve years they received all dividends paid on the stock and Pickard took an active interest in the Company's affairs. He also was a vice-president of the Columbia Broadcasting Company and had obtained the stock on the assurance that he would help to secure Columbia affiliation for Station WOKO, would furnish, without charge, Columbia engineers to construct the station at Albany, and supply a grand piano and certain newspaper publicity.

The company, however, in reporting to the Federal Radio Commission and to the Federal Communications Commission the names of its stockholders as it was required to do for many years and in many applications, concealed the fact that the Pickards held this stock interest and represented that the shares were held by others. Its general manager appeared on behalf of the applicant at

various hearings and furnished false testimony to both Commissions regarding the identity of the corporation stockholders and the shares held by each so as to conceal the Pickard holdings. The purpose of the concealment was to prevent the facts from becoming known to Pickard's Columbia colleagues.

The Court of Appeals for the District of Columbia reversed the Commission's decision denying renewal of the license, a majority for the various reasons that we will consider. The dissenting Chief Justice noted that he did "very heartily agree with the view that this is a hard case. The Commission's drastic order, terminating the life of the station, punishes the innocent equally with the guilty, and in its results is contrary to the Commission's action in several other comparable cases. But that the making of the order was within the discretion of the Commission, I think is reasonably clear." We granted certiorari because of the importance of the issue to the administration of the Act.

We come to a consideration of the reasons which led the Court of Appeals to reverse the order of the Commission under the admonition that "review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." 48 Stat. 1094, 47 U. S. C. § 402 (e).

The Act provides as to applications such as WOKO filed that "All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station . . . and such other information as it may require." It requires such statements to be under oath or affirmation. 48 Stat.

1084, 47 U. S. C. § 308 (b). It provides, too, that any station license may be revoked for false statements in the application. 48 Stat. 1086, 47 U. S. C. § 312 (a).

It is said that in this case the Commission failed to find that the concealment was of material facts or had influenced the Commission in making any decision, or that it would have acted differently had it known that the Pickards were the beneficial owners of the stock. We think this is beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose. If the applicant had forthrightly refused to supply the information on the ground that it was not material, we should expect the Commission would have rejected the application and would have been sustained in so doing. If we would hold it not unlawful, arbitrary or capricious to require the information before granting a renewal, it seems difficult to say that it is unlawful, arbitrary or capricious to refuse a renewal where true information is withheld and false information is substituted.

We are told that stockholders owning slightly more than 50 per cent of the stock are not found to have had any part in or knowledge of the concealment or deception of the Commission. This may be a very proper consideration for the Commission in determining just and appropriate action. But as matter of law, the fact that there are innocent stockholders can not immunize the corporation from the consequences of such deception. If officers of the corporation by such mismanagement waste its assets, presumably the State law affords adequate remedies against the wrongdoers. But in this as in other matters, stockholders entrust their interests to their chosen officers and often suffer for their dereliction. Consequences of

such acts cannot be escaped by a corporation merely because not all of its stockholders participated.

Respondent complains that the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in other cases. Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. *Cf. Navarro Broadcasting Association*, 8 F. C. C. 198. But the very fact that temporizing and compromising with deception seemed not to discourage it, may have led the Commission to the drastic measures here taken to preserve the integrity of its own system of reports. The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

It also is contended that this order inflicts a penalty, that the motive is punishment and that since the Commission is given no powers to penalize persons, its order must fall. We think it unnecessary to indulge in the exposition of what a penalty is. It is enough to decide this case to know what a penalty is not. A denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure. It may hurt and it may cause loss, but it is not made illegal, arbitrary or capricious by that fact.

Lastly, and more importantly, the Court of Appeals suggested that in order to justify refusal to renew, the Commission should have made findings with respect to the quality of the station's service in the past and its equipment for good service in the future. Evidence of the station's adequate service was introduced at the hearing.

The Commission on the other hand insists that in administering the Act it must rely upon the reports of licensees. It points out that this concealment was not caused by slight inadvertence nor was it an isolated instance, but that the Station carried on the course of deception for approximately twelve years. It says that in deciding whether the proposed operations would serve public interest, convenience or necessity, consideration must be given to the character, background and training of all parties having an interest in the proposed license, and that it cannot be required to exercise the discretion vested in it to entrust the responsibilities of a licensee to an applicant guilty of a systematic course of deception.

We cannot say that the Commission is required as a matter of law to grant a license on a deliberately false application even if the falsity were not of this duration and character, nor can we say that refusal to renew the license is arbitrary and capricious under such circumstances. It may very well be that this Station has established such a standard of public service that the Commission would be justified in considering that its deception was not a matter that affected its qualifications to serve the public. But it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter. We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law.

The judgment of the Court of Appeals is reversed and the case remanded to that court with direction to remand to the Commission.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.